A **GARDEN BAY SDN BHD v. SIME DARBY PROPERTY BHD**

COURT OF APPEAL, PUTRAJAYA
KAMARDIN HASHIM JCA
SURAYA OTHMAN JCA
AZIZAH NAWAWI JCA
B [CIVIL APPEAL NO: W-02(C)(A)-2268-12-2016]
11 DECEMBER 2020

ARBITRATION: *Award – Setting aside – Appeal against – Dispute between contracting parties referred to arbitration – Whether award dealt with dispute not*
C *contemplated by or not falling within terms of submission to arbitration – Whether there was breach of natural justice – Whether arbitrator considered claim and counterclaim based on evidence presented – Whether arbitrator empowered to draw upon own knowledge and expertise in subject matter – Whether award ought to be set aside – Arbitration Act 2005, ss. 21(3)(b), 30(5), 37(1)(a)(iv), 37(1)(b)(ii),*
D *37(2)(b)(i) & 37(2)(b)(ii)*

The respondent, Sime Darby Property Bhd ('SD'), had appointed the appellant, Garden Bay Sdn Bhd ('GB'), as their contractor for turfing and landscaping works for a project. When disputes later arose, the parties resorted to arbitration where GB claimed for the sum of RM338,666.39,
E being the balance sum unpaid, while SD counterclaimed for (i) general damages to be assessed for GB's delay in completing the landscape works; and (ii) RM246,978 for rectification works. The arbitrator decided that, in respect of (i) SD's claim, SD was to pay GB, *inter alia*, RM282,512 as the final amount; and (ii) GB's counterclaim, GB's liability for the incomplete
F rectification work was 2.5% of the contract sum amounting to RM21,154.39 and the amount was to be set off from the final certificate amount of RM338,666.39 due. Aggrieved, SD filed originating summons ('OS') ('first OS') at the High Court to set aside the whole of the award. The High Court ordered the arbitral tribunal to state in sufficient detail the reasons for the
G finding that GB was liable for RM21,154.39 as costs of rectification of defects when SD's claim for the rectification of defects done was for RM246,978 ('consent order'). The arbitrator handed down a supplementary award, maintaining the amount awarded as RM21,154.39. As the first OS had been closed down by the court after the recording of the consent order, the parties filed the present originating summonses. SD applied to set aside
H the award and the supplementary award, under s. 37(1)(a)(iv), 37(1)(b)(ii), 37(2)(b)(i) and 37(2)(b)(ii) of the Arbitration Act 2005 ('Act'), on the grounds that (i) there was a breach of natural justice when the arbitrator decided to award the sum of RM21,154.30 instead of RM246,978 claimed by SD; and (ii) the award by the arbitrator of the sum of RM21,154.39 dealt with a
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dispute not contemplated by or not falling within the terms of the parties' submission to arbitration ('SD's application'). GB, on the other hand, filed OS for the recognition of the award pursuant to s. 38 of the Act ('GB's application'). The High Court Judge ('HCJ') allowed SD's application and dismissed GB's application. GB appealed against the said decision to the Court of Appeal and the appeal was allowed. SD referred the case to the Federal Court and the appeal was remitted back for a re-hearing before the present court.

Held (allowing appeal with costs)
Per Azizah Nawawi JCA delivering the judgment of the court:

(1) Based on the supplementary award, the arbitrator had considered SD's claim for rectification in the sum of RM246,978 and had dismissed the same based on the evidence presented before her. Both parties were given the opportunity to present their case before the arbitrator made the award. The arbitrator had also given the reasons why she had dismissed SD's application for the rectification costs of RM246,978. What the HCJ did was to carve out one paragraph of the supplementary award to make a finding that the arbitrator had decided that the rectification cost was limited to the amount of the retention sum, that this issue was not pleaded, nor raised by parties and therefore constituted a breach of natural justice. As such, the HCJ fell into error in failing to consider both the award and the supplementary award in their entirety. (paras 41 & 42)

(2) Section 21(3)(b) of the Act empowers the arbitrator to draw her own knowledge and expertise in the subject matter. The arbitrator made reference to the Handbook for PAM Contract 2006 ('Handbook'), which would be the reference for PAM contracts in the construction industry. It was also permissible for the arbitrator to refer to the Handbook under s. 30(5) of the Act as the arbitral tribunal '… shall take into account the usage of the trade applicable to the transaction'. The arbitrator's reference to the Handbook was reasonably foreseeable and not surprising. (paras 46 & 48)

(3) There was no prejudice to SD as the arbitrator had granted SD's rectification cost of RM21,154.39 despite her findings that SD failed to prove their claim for rectification costs done. The award was also generous, bearing in mind the arbitrator's above finding. The HCJ failed to give proper analysis of the reasons given by the arbitrator on her dismissal of SD's counterclaim for rectification costs of RM246,978. Therefore, the HCJ was wrong to conclude that the arbitrator was limiting SD's counterclaim in the arbitration to retention sum only.

There was no breach of rules of natural justice before the arbitral tribunal that warranted the whole award to be set aside. (paras 50, 57 & 59)

(4) It was not correct for SD to submit that the issue submitted for arbitration was GB's claim for RM338,666.39 only, being the balance sum which remained unpaid by SD. The issue on the rectification cost was also part of SD's counterclaim in the arbitration. Therefore, the issue posed by SD and accepted by the HCJ, that whether there was consent between the parties by conduct that SD had accepted the retention sum as payment for rectification, was an issue within the contemplation of the parties on the rectification costs. (paras 65 & 66)

Case(s) referred to:

Chain Cycle Sdn Bhd v. Kerajaan Malaysia [2016] 1 CLJ 218 CA ***(refd)***

Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd [2008] 3 CLJ 791 CA ***(refd)***

Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***

Garden Bay Sdn Bhd v. Sime Darby Property Bhd [2018] 6 CLJ 199 CA ***(refd)***

Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor [2019] 1 CLJ 1 FC ***(refd)***

Pancaran Prima Sdn Bhd v. Iswarabena Sdn Bhd & Another Appeal [2020] 9 CLJ 466 FC ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 21(3)(b), 30(5), 37(1)(a)(iv), (b)(ii), (2)(b)(i), (ii), (6), 38, 42(3)

For the appellant - Zainur Zakaria, Coli Victor George & Phung Zhu Yen Grace; M/s Colin Victor & Co

For the respondent - Raymond Mah & Prisilla Chong; M/s Mah Weng Kwai & Assocs

[Editor's note: For the High Court judgment, please see Sime Darby Property Bhd v. Garden Bay Sdn Bhd & Another Case [2017] 6 CLJ 107 (overruled).]

Reported by Najib Tamby

JUDGMENT

Azizah Nawawi JCA:

Introduction

[1] This is the appellant's appeal against the decision of the High Court Judge dated 7 November 2016, who had set aside both the arbitration award dated 6 November 2014 ("award") and the supplementary award dated 28 October 2015 ("supplementary award") pursuant to s. 37(1)(b)(ii), 37(2)(b)(i) and/or 37(2)(b)(ii) of the Arbitration Act 2005 ("AA 2005")

[2] Having considered the appeal record and the submissions of all parties, this court had allowed the appeal with costs. Our decision was unanimous and these are our grounds for allowing the appeal and for ease of reference, parties will be referred to as they were in the High Court.

The Salient Facts

[3] *Vide* a letter of acceptance dated 8 February 2011, Sime Darby Property Bhd ("Sime Darby") had appointed Garden Bay Sdn Bhd ("Garden Bay"), as their contractor for turfing and landscaping works for a project known as "Cadangan Pembangunan Landskap bagi Membina 132 Unit Rumah Teres Dua Tingkat Dan Tiga Tingkat Serta Dua Unit Pencawang Elektrik Di Fasa I-8, Seksyen U16, Denai Alam, Shah Alam, Selangor Darul Ehsan" for a lump sum of RM846,175.50 ("the project").

[4] Disputes and differences arose between the parties and these were then referred to arbitration as stipulated in cl. 54 of the conditions of contract ("contract").

[5] Garden Bay was the claimant at the arbitration, claiming for the sum of RM338,666.39 being the balance sum remaining unpaid, interests and costs.

[6] The respondent, Sime Darby had counterclaimed for general damages to be assessed for the claimant's delay in completing the landscape works, the sum of RM246,978 for rectification works, together with interests and costs.

[7] The arbitrator heard witnesses from both parties and on 6 November 2014, handed down her award and made the following determination in para. 5.0 of the award:

(i) that Sime Darby pays Garden Bay the sum of RM282,512 as the final amount due to Garden Bay as at 23 October 2013;

(ii) that Sime Darby pays Garden Bay simple interest at the rate of 5% per annum on the said sum of RM282,512 calculated from 23 October 2013 until the date of the arbitration award;

(iii) that Sime Darby pays Garden Bay simple interest at the rate of 5% per annum on the said sum of RM282,512 from the date of the arbitration award until full and final satisfaction of the said sum;

(iv) that Sime Darby pays Garden Bay the cost of the arbitration of RM20,500;

(v) that Sime Darby pays its own cost and the cost of its solicitor; and

(vi) Sime Darby pays Garden Bay the cost and the cost of its solicitor on a client – solicitor basis to be taxed by the court.

[8] In respect of Sime Darby's counterclaim, the arbitrator's finding were as follows at para. 4.40:

> Considering all the facts and circumstances available to the Arbitrator for this arbitration, I find and hold the Claimant is liable to pay LAD of RM35,000.00 to be set off from the Final Certificate Amount of RM338,666.39 due to the Claimant.
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> As to costs for rectification work not completed as at 26 December 2012, I find and hold that the amount of Claimant's liability is 2½% of Contract Sum amounting to RM21,154.39 as per para 2.35, to be set off from the Final Certificate Amount of RM338,666.39 due to the Claimant.

[9] Aggrieved by the said award, Sime Darby had filed an Originating Summons No. 24C(Arb)-13-03-2017 ("first OS") under s. 37 and alternatively under s. 42 of the AA 2005, to set aside the whole of the award, which favoured Garden Bay on its claim and partly in Sime Darby's favour on the counterclaim for damages and rectification works.

[10] During the proceedings of the first OS, the High Court had ordered the arbitral tribunal, pursuant to sub-s. 42(3) of the AA 2005, to state in sufficient detail, within 45 days from the date of the service of the order or such other period as the parties may agree, the reasons for the finding that the Garden Bay was liable for RM21,154.39 as costs of rectification of defects when Sime Darby's claim for the rectification of defects done and claimed by Pembinaan Muzqi Sdn Bhd ("PMSB") was for RM246,978 ("consent order").

[11] The arbitrator then handed down the supplementary award dated 28 October 2015, maintaining the amount awarded as RM21,154.39. In doing so, the learned arbitrator *inter alia*, concluded that:

> The Claimant is liable for rectification works under its scope as instructed by the SO. By conduct, both Parties had accepted Retention Sum as a mode to allocate funds for rectification work as per the normal practice in construction contracts.
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> As per F/A Para 2.35, the Respondent had retained RM21,154.39 as Retention Sum under Employer's Payment Advice dated 29 March 2012 as the cost of the Claimant's liability for outstanding rectification of defects …
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> … For the reasons above, the Respondent is not in a position to claim for rectification of defects by PMSB for the sum of RM246,978.00.

[12] As the first OS had already been closed by the court after the recording of the consent order, parties then filed their respective current originating summonses.

[13] In the present originating summons, Sime Darby had applied to set aside both the award and the supplementary award under s. 37(1)(a)(iv), 37(1)(b)(ii), 37(2)(b)(i) and 37(2)(b)(ii) of the AA 2005. Essentially, Sime Darby's complaints were that:

(i) there was a breach of natural justice when the arbitrator decided to award the sum of RM21,154.30 instead of the amount of RM246,978 claimed by Sime Darby; and

(ii) that the award by the arbitrator of the sum of RM21,154.39 dealt with a dispute not contemplated by or not falling within the terms of parties' submission to arbitration.

[14] Alternatively, the application was also premised on s. 42 of the AA 2005, and the questions of law were as follows:

(i) whether the arbitrator could make a finding based on an issue, which was never presented or argued before her; and

(ii) whether, by not inviting parties to present or argue on the issue which formed the award, the arbitrator had acted beyond her jurisdiction and breached the rules of natural justice.

[15] On the other hand, Garden Bay had filed an originating summons for recognition of the arbitration award pursuant to s. 38 of the AA 2005. Both Sime Darby's and Garden Bay's originating summonses were heard together with consent of the parties.

[16] The learned judge had dismissed Garden Bay's enforcement application and allowed Sime Darby's application to set aside the award and the supplementary award under s. 37. The learned judge did not deal with the application premised on s. 42 of the AA 2005.

[17] Aggrieved by the decision of the learned judge, Garden Bay had filed an appeal to the Court of Appeal.

[18] Garden Bay's appeal was allowed by the Court of Appeal on 22 December 2017 and the order of the learned High Court Judge was set aside. Essentially, the Court of Appeal had decided the appeal based on s. 37(6) of the AA 2005 (see *Garden Bay Sdn Bhd v. Sime Darby Property Bhd* [2018] 6 CLJ 199).

[19] Sime Darby then proceeded to refer the case to the Federal Court, where leave was granted. On 12 December 2018, after hearing the substantive appeal, the Federal Court made, *inter alia*, the following order:

1. Keseluruhan keputusan Mahkamah Rayuan dan Rayaun Sivil No: W-02(C)(A)-2268-12/2016 diketepikan;

2. Rayuan Responden didengar semula di Mahkamah Rayuan berdasarkan Memorandum Rayuan Responden bertarikh 2.2.2017.

[20] No written ground was given by the Federal Court when remitting the appeal back for a rehearing before the Court of Appeal.

The Findings Of The Court

[21] Sime Darby's originating summons read as follows:

> … of an application pursuant to the Sections 37(1)(a)(iv), 37(1)(a)(v), 37(1)(b)(ii), 37(2)(b)(i) and 37(2)(b)(ii) of the Arbitration Act 2005 and/or Sections 42(1)(1A), 42(4)(b), 42(5) of the Arbitration Act 2005 and/or Order 7, Rule 2 and Order 69 Rule 2 & 4 and/or upon the inherent jurisdiction of the Court pursuant to Order 92 rule 4 of the Rules of Court 2012 on the part of the Plaintiff for the following Orders:
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> 1. That pursuant to Sections 37(1)(a)(iv), 37(1)(a)(v), 37(1)(b)(ii), 37(2)(b)(i) and/or 37(2)(b)(ii) of the Arbitration Act 2005, the Arbitration Award of Menaha Ramanath dated 6.11.2014 ("Award") be set aside;
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> 2. In the alternative to prayer 1 above,
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> 2.1. that pursuant to Section 42(1)(1A), 42(4)(b) and 42(5) of the Arbitration Act 2005, the following questions of law arising out of the Award be decided by the High Court:
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> (a) Whether the Arbitrator could make a finding based on an issue, which was never presented or argued before her; and
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> (b) Whether by not inviting parties to present or argue on the issue which formed the Award, the Arbitrator had acted beyond her jurisdiction and breached the rules of natural justice.
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> 2.2. That the part of the Award awarding the Plaintiff the sum of RM21,154.39 as rectification costs be varied and increased to the sum of RM246,978 which was incurred and paid by the Plaintiff to Pembinaan Muzqi Sdn Bhd as rectification costs; or alternatively that the Award be set aside.

[22] The grounds of the application were as follows:

(i) The award and the supplementary award contained decisions on matters beyond the terms of the submission to arbitration and/or beyond the scope of the submission to arbitration, in which the arbitrator's findings that parties had "by conduct" accepted that the rectification costs are limited to the retention sum, were never presented and/or submitted before the arbitrator.

(ii) The issue of whether the costs of rectification works that can be claimed is limited to the amount of the retention sum, is an issue which never arose in the course of the arbitral proceedings, and the parties were not alerted to and invited to address.

(iii) The arbitrator went beyond the scope of the submission to arbitration by unilaterally deciding that parties had "by conduct" agreed for the rectification costs to be limited to the retention sum amounting to RM21,154.39.

(iv) the award and the supplementary award were in conflict with the public policy of Malaysia because they were given in breach of the rules of natural justice, both during the arbitral proceedings and/or in connection with the making of the awards.

(v) the questions of law raised under s. 42 of the AA 2005 substantially affected the right of Sime Darby to claim the full rectification costs of RM246,978 incurred and paid to PMSB, as provided under cl. 5(b) of the contract.

[23] It is to be noted that Sime Darby did not challenge the arbitrator's finding/decision to allow Garden Bay's claim of RM338,666.39, being the balance sum which remained unpaid by Sime Darby in the project.

[24] Sime Darby's complaint was only with regard to part of the counterclaim, the award of RM21,154.39 to Sime Darby for the rectification works, instead of the full sum of RM246,978 claimed by Sime Darby.

[25] However, Sime Darby had premised this application under s. 37 of the AA 2005 to set aside the whole award, and alternatively under s. 42 of the AA 2005 to vary the sum of RM21,154.39 and increased the same to the full claim for the rectification works of RM246,978.

[26] The learned trial judge did not deal with s. 42 of the AA 2005 after making a finding and decided the case in favour of Sime Darby under s. 37 of the AA 2005, which reads:

37. Application for Setting Aside

(1) An award may be set aside by the High Court only if:

(a) the party making the application provides proof that:

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

A (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

B (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

C (b) the High Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

D (2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred:

E (i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

[27] The learned trial judge had set aside the award and the supplementary award based on s. 37(1)(b)(ii) and 37(2)(b)(i) or (ii) and s. 37(1)(a)(iv) of the F AA 2005. Section 37(1)(b)(ii) and 37(2)(b)(i) or (ii) of the AA 2005 deals with the issue of a breach of natural justice, whilst s. 37(1)(a)(iv) applies to award that deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.

Breach Of Natural Justice

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[28] The issue posed before the learned judge was whether there has been a breach of natural justice when the arbitrator decided that by conduct, the parties have accepted that Sime Darby's claim for rectification works is the sum retained as retention sum under the contract.

H **[29]** The learned judge's finding of this issue can be seen from the following paragraphs of the judgment:

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[32] The arbitrator had held at para. 4.23 of the award that the claimant has to be liable for rectification works under its scope as instructed by the SO. She then went on to hold that:

> By conduct, both Parties had accepted Retention Sum as a mode to allocate funds for rectification works as per the usual practice in construction contracts, although not provided for in the Contract for this matter.

[33] When the parties had not conducted the case in that manner, the respondent Sime Darby was rather perplexed as to how such a determination had been arrived at. The claimant's case was that they had done all the rectification works. The respondent's case was that they had engaged a third party contractor to rectify the defective works and that under cl. 5(b) of the conditions of contract they were entitled to recover all costs incurred thereby.

[34] The relevant clauses in the conditions of contract are cl. 4 and cl. 5(b) which reads as follows:

> 4. The Contractor shall upon and subject to these Conditions construct and complete the Works shown upon the Contract Drawings and described by or referred to in the Bills of Quantities and/or Specification and in the Articles of Agreement and these Conditions in compliance therewith, using materials, moods and workmanship of the quality and standards therein specified. The Contractor shall also make good any defect, imperfection, shrinkage or any other fault whatsoever which may appear during the Defect Liability Period in accordance with Clause 45 hereof.
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> ...
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> 5(b) The Contractor shall (subject to sub-clause (c) hereof) forthwith comply with all instructions issued to him by the S.O. If within seven (7) days after receipt of a written notice from the S.O. requiring compliance with an instruction the contractor does not comply therewith, then the S.O. without prejudice to any other rights or remedies available to the Government under the Contract may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to such instruction and all costs incurred in connection with such employment shall be recoverable from the Contractor by the Government or the S.O. on its behalf as a debt or may be deducted by the Government from any monies due or to become due to the Contractor under this Contract.

[35] After the consent judgment recorded by the parties for the arbitrator to give her reasons for the said finding, the arbitrator maintained the reason as stated in para. 2.5 of the supplementary award that:

A By conduct, both Parties had accepted Retention Sum as a mode to allocate funds for rectification works as per the normal practice in construction contracts.

As per F/A Para 2.35, the Respondent had retained RM21,154.39 as Retention Sum under Employer's Payment Advice dated 29 March 2012 B as the cost of the Claimant's liability for outstanding rectification of defects.

[36] *Though the word limit was not used by the arbitrator, clearly the arbitrator was limiting the respondent's counterclaim in the arbitration to the retention sum. I find merits in the submission of learned counsel for the respondent Sime Darby that the issue of whether the costs of rectification works that can be claimed is limited to the* C *amount of the retention sum, was not an issue which arose in the pleadings or in the course of the arbitration proceedings. The parties were not alerted to this issue by the arbitrator and were not invited by the arbitrator to submit on this issue.* (emphasis added)

[30] It is trite law that the final award of the arbitrator must be viewed in D its totality. In *Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791, the Court of Appeal held as follows:

The final award of the arbitrator must be viewed in its totality and, any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and unconscionable E to subsist and, thereby justify it be set aside.

[31] Sime Darby took the position that under cl. 5(b) of the contract, Sime Darby was entitled to recover all cost from Garden Bay for the rectification works carried out by PMSB. In para. (51) of Sime Darby's submission before the arbitrator, Sime Darby had submitted that cl. 5(b) entitled them to F recover all costs incurred in connection with the employment of PMSB to execute the works under the superintending officer's ("SO") instruction and that these costs incurred can be deducted from any monies due or become due to Garden Bay under the contract. This issue was considered by the arbitrator, when she referred to the statement of final account prepared by G landscape architect stating the following:

Original Contract Sum …			RM225,240.00
Variation on Contract	–	Addition Variation order	4,212.00
	–	Addition Premeasurement	17,526.00
H Final Contract sum			**RM246,978.00**

[32] Garden Bay did not deny Sime Darby's right under cl. 5(b) of the contract but states that such rights must be exercised during the currency of the contract before the issuance of the certificate of practical completion ("CPC"). Added to that, for such clause to apply, Sime Darby must prove I on the balance of probabilities what were the scope and costs of the rectification works that were done by PMSB.

[33] The CPC was issued on 17 October 2011 and *vide* a site memo dated 26 December 2012, Garden Bay was notified that the SO was in the midst of appointing a third party contractor to execute the remaining rectification works. PMSB was appointed on 31 December 2013 and a CPC was issued to PMSB on 18 March 2013. Thus, Sime Darby submits that it was entitled to withhold or deduct any monies incurred for employing PMSB to execute the outstanding works. Sime Darby submits that the rectification cost of RM246,978 must then be set off from Garden Bay as provided under cl. 5(b) of the contract.

[34] There was no joint inspection to look into the rectification works before the engagement of PMSB. Since the CPC was issued to Garden Bay on 17 October 2011, then Garden Bay was left with the responsibility and liability to rectify defects only during the defect liability period ("DLP") between 18 October 2011 to 17 April 2013. In the award, the arbitrator held that since the SO had issued the stop work order *vide* Site Memo No. 7 dated 26 December 2012, Garden Bay "did not have the opportunity to complete rectification of defects within the defects liability period ending 17 April 2013".

[35] With regards to the defects of cracked hardscape surfaces and worn grass, the arbitrator came to the following conclusion:

> The photographic record as at 6 April 2014 produced by the Claimant in Bundle C2 indicates similar status of defects of cracked hardscape surfaces and worn grass courts as at 7 January 2013 recorded by PMSB.
>
> The crack lines on the hardscape are signs of settlement of the ground below due to insufficient preparation to the earth and consolidation below ... **The defects of cracked walkway is due to works not carried out by other contractors and should not be charged to the Claimant.**
>
> ... The **preparation of the ground was the responsibility of the Respondent's 'other contractors' before the Claimant took possession of the site.**
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> As per Para 2.46 and 2.47, comparison of photographs taken on 7 January 2013 and 6 April 2014 indicates that defects were still present as at 6 April 2014. (emphasis added)

[36] The arbitrator had also considered that Garden Bay was entitled to RM3,674 per month for maintenance of the softscape, but there was no evidence of maintenance, nor was there any evidence to show that Sime Darby had paid Garden Bay any maintenance charges for the softscape maintenance. This led to the arbitrator to come to the following conclusion:

> The defective condition of the turf on the field was due to no maintenance. **The Respondent did not pay the Claimant for maintenance and should not ask for reimbursement.** The Respondent should have paid others to maintain the turfing and softscape instead.
>
> (emphasis added)

[37] The arbitrator had also considered the drawings with regard to the garden benches, walkways and the reflexology path and made the following findings:

> Analysis of the drawings indicate different details for the base of the garden benches, additional work for concrete base was required under PMSB's scope and **should not be considered as rectification or outstanding work.**
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> **The SO had accepted the work for the reflexology** path with the issuance of the Certificate of Practical Completion to the Claimant, **however then instructed PMSB to redo the reflexology path. The edge details differ in the 2 sets of drawing.** (emphasis added)

[38] As such, the arbitrator found that the claimant, Garden Bay was only liable for works as per the drawings issued during the currency of Garden Bay's contract.

[39] Based on the above-mentioned findings, which were the reasons enumerated in the supplementary award, the arbitrator made a finding of fact that Sime Darby had failed to prove, on the balance of probabilities, the claim for rectification of defects by PMSB in the sum of RM246,978:

> With STOP WORK ORDER the SO did not carry out a joint site inspection, taken steps to ascertain diminution in the value of the defects in the Claimant's Works based on the construction drawings issued to the Claimant and prepare the final account. There was no evidence provided for such a joint inspection.
>
> **For all the reasons above, the Respondent is not in a position to claim for rectification defects by PMSB for the sum of RM246,978.00.**
>
> (emphasis added)

[40] The arbitrator had made a finding that because there was no joint site inspection, there was no valuation of the works done by Garden Bay, whether there were defects in the works carried based on the construction drawings or the costs of the rectification works.

[41] Having considered the supplementary award, we find that the arbitrator had considered Sime Darby's claim for rectification in the sum of RM246,978, and had dismissed the same based on the evidence presented before her. Both parties were given the opportunity to present their respective cases before the arbitrator made the award. The arbitrator had also given the reasons why she had dismissed Sime Darby's application for the rectification costs of RM246,978, as enumerated above.

[42] As such, we find that the learned judge fell into error when he failed to consider both the award and the supplementary award in their entirety. What the judge did was to carve out one paragraph of the supplementary award and made a finding that the arbitrator had decided that the rectification cost was limited to the amount of the retention sum, that this issue was not pleaded, nor raised by parties and therefore constituted a breach of natural justice. In fact, the learned trial judge even admitted that the word 'limit' was not even used by the arbitrator, nevertheless the learned judge proceeded to interpret the award and the supplementary award in such a restrictive manner that did not do justice to the arbitrator's findings.

[43] We are also of the considered opinion that having made a finding that Sime Darby had failed to prove that it was entitled to the rectification cost of RM246,978, there was no necessity for the arbitrator to award RM21,154.39 of the retention sum to Sime Darby. In fact, in para. [48] of the judgment, the judge had stated that it "was within the parties' submission to arbitration that the arbitrator should decide on whether the Sime Darby was entitled to the sum of **RM246,978** being the costs of rectification works or **such other amount as may be assessed** by the arbitrator or **not at all** ...". (emphasis added)

[44] However, the arbitrator went further to consider the fact that since Sime Darby had retained RM21,154.39 as retention sum under the employer's payment advice dated 29 March 2012, then the same can be retained by Sime Darby as rectification cost. The arbitrator had looked at the issue of knowledge of retention sum in para. 4.36 of the award:

> "Retention Sum' is generally understood by the building industry as a sum retained by the Employer towards a Retention Fund to mean the same as explained in Hand book for PAM Contract 2006 p 269'. **The main purpose of the Retention Fund is to ensure that if the Contractor fails to perform his obligation,** such as the failure to carry out any works as instructed by the Architect, **failure to rectify Defects,** delay or other breaches of the contract, the **Employer will have available to him the retention fund to pay third parties employed to carry out the default works to recover his cost and loss.**
>
> (emphasis added)

[45] The learned judge however took issue on this and held as follows:

> *[43] It may further be added that if the arbitrator had wanted to rely on her knowledge of what she understood to be the usual practice in construction contracts, then she should inform the parties about it and invite them to challenge such an understanding of usual practice.* I am not unaware that an arbitral tribunal shall have the power under s. 21(3)(b) AA to draw on its own knowledge and expertise in deciding on a dispute before it. Likewise, an arbitrator shall decide based on the usual practice in the building industry as provided for under s. 30(5) AA which reads:

A (5) The arbitral tribunal shall, in all cases, decide in accordance with the terms of the agreement and shall take into account the usages of the trade applicable to the transaction.

I am also mindful of s. 26(5) AA that reads:

B Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. (emphasis added)

[46] We are of the considered opinion that s. 21(3)(b) of the AA 2005 empowered the arbitrator to draw her own knowledge and expertise in the subject matter. In the present appeal, the arbitrator was only making C reference to the Handbook for PAM Contract 2006, which would be the reference for PAM contracts in the construction industry. It was also permissible for the arbitrator to refer to Handbook for PAM Contract 2006 under s. 30(5) of the AA 2005, as the arbitral tribunal "… shall take into account the usages of the trade applicable to the transaction".

D **[47]** With regards to the application of s. 21(3)(b) of the AA 2005, the Federal Court in *Pancaran Prima Sdn Bhd v. Iswarabena Sdn Bhd & Another Appeal* [2020] 9 CLJ 466 made the following findings:

E [92] The power of arbitrators to draw on their own knowledge and expertise in appropriate cases is essential to arbitration in very many cases: *Fox and others* (*supra*).

…

F [97] What is noticeable in both *Rotoaira* and *Methanex Motunui* is that in the exercise of the power to draw on one's own knowledge and expertise, the two elements are: (1) "reasonable foreseeability" and (2) "surprise". These are the two crucial elements in determining the boundaries of the exercise of that power.

G [98] In *Rotoaira*, the arbitrator rejected both the parties' methods of calculating the percentage of the stumpage. Instead, he applied his own methodology of computation beyond what the parties submitted. The court did not find the arbitrator to be in breach of the rules of natural justice just because he failed to give the parties the opportunity to deal with the approach taken by him.

H [99] In the context of the present case, we do not think that the drawing by the arbitrator on his own knowledge and expertise of the 10-15% no-risk profit margin for P&A as being "almost a norm" in the Malaysian construction industry *was something that was not reasonably foreseeable or was a significant surprise to the respondent, so much so that the failure by the learned arbitrator to give it the opportunity to submit on the issue had resulted in a serious breach of the rules of natural justice.* While it is true that the arbitrator was not expected to know everything about the norms in the Malaysian I construction industry, neither is he expected to know nothing at all. (emphasis added)

[48] Therefore, we find that the arbitrator's reference to the Handbook for PAM Contract 2006 was reasonably foreseeable and not surprising.

[49] In any event, Sime Darby took the position that they were prejudiced and deprived of an opportunity to address the issue of whether the parties by conduct had accepted that Sime Darby's claim for rectification cost was the sum retained as retention sum.

[50] In the first place, there was no prejudice to Sime Darby as the arbitrator had granted Sime Darby's rectification cost of RM21,154.39 despite her findings that Sime Darby had failed to prove their claim for the rectification costs done by PMSB. Added to that, we agree with Garden Bay that the award of RM21,154.39 was indeed generous, bearing in mind the arbitrator's finding that Sime Darby had failed to establish its rectification claim of RM246,978.

[51] However, Sime Darby's complaint was with regard to the following finding by the arbitrator:

> By conduct, both Parties had accepted Retention Sum as a mode to allocate funds for rectification works as per the usual practice in construction contracts, although not provided for in the Contract for this matter.

[52] Reference to the said "conduct" can be found in para. 4.36 of the award:

> *Both the Claimant's Progress Claims and the SO's Interim Payment Certificates had included a percentage of the Contract Sum for Retention Sum, although not provided for in the Contract. It appears the intention of the Parties by conduct to accept this retention, subsequently in Payment Certificate No. 5 one moiety (2½% of the Contract Sum) was returned to the Claimant.*
>
> *The Respondent's position in its oral evidence and submission has taken the position that the retention sum deducted from payments due to the contractor as stated in Payment Advice was for LAD permitted pursuant to Clause 40 of the Conditions of Contract.*
>
> Para 4.14, Conditions of Contract 'Clause 40. Damages for Non-completion states '… the SO certifies in writing that in his opinion the same ought reasonably so to have been completed the contractor shall pay the Government a sum calculated at the rate stated in the appendix as Liquidated and Ascertained Damages for the period during which the said Works shall so remain and have remained incomplete and the SO may deduct such damages from any monies due to the contractor'.
>
> The Clause 40 is clear that LAD is deducted not retained and then returned. (emphasis added)

[53] Therefore, the arbitrator has made a finding of fact that because both Garden Bay's progress claims and the SO's interim payment certificates (Sime Darby) had included a percentage of the contract sum for retention sum, (although not provided for in the contract), the arbitrator then came to a conclusion that the said conduct showed the intention of the parties to accept this retention sum as a mode to allocate funds for rectification works. It is trite law that an arbitrator's findings of facts are immune from any interference from this court. In *Chain Cycle Sdn Bhd v. Kerajaan Malaysia* [2016] 1 CLJ 218, the Court of Appeal held that the arbitrator is the master of the facts, and that the courts should not review the award on its merits, akin to an appeal.

[54] In *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693, the Federal Court held as follows:

> [153] Where there is a question of fact, 'The arbitrators (remain) the masters of the facts. On appeal the court must decide any questions of law arising from the award on the basis of full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers these findings to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be or what the scale of the financial correspondences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. *Parties who submit their disputes to arbitration bind themselves by the agreement to honour the arbitrator's award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrator's findings of fact' (The 'Baleares' at p 228). '... on findings of facts an arbitrator is the sole judge. Further, whether he drew the wrong inferences of facts from the evidence itself is not sufficient as a ground to warrant setting aside his award* (see *GKN Centrax Gears Ltd v. Matbro Ltd* [1976] 2 Llyod's Rep 555)' (*Future Heritage Sdn Bhd v. Intelek Timur Sdn Bhd* [2003] 1 CLJ 103; [2003] 1 MLJ 49 per Richard Malanjum JCA, as he then was) ...
>
> (emphasis added)

[55] With regard to Sime Darby's complaint that they were not given the opportunity to address the issue, we find no basis for this as the arbitrator had stated in both the award and the supplementary award that Sime Darby had taken the position (both oral evidence and submission) that the retention sum deducted from payments due to the contractor as stated in payment advice was for LAD pursuant to cl. 40 of the conditions of contract. Whereas, the arbitrator had applied the Handbook for PAM Contract 2006, that the main purpose of the retention fund was to ensure that if the Garden Bay failed to perform his obligation, such as failure to rectify defects, then Sime Darby can use the retention fund to pay third parties (MBSB) employed to carry out the default works to recover his cost and loss. Again, this is a finding of fact by the arbitrator which should not be disturbed by this court.

[56] In any event, even if the arbitrator was wrong in not giving the parties an opportunity to explain the issue of the conduct of parties to accept the retention sum as a mode to allocate funds for rectification works, we find that since the same was decided in Sime Darby's favour, the same cannot be said to have such grave and material impact on the due process of the arbitration. In *Pancaran Prima* (*supra*), the Federal Court held as follows:

> [109] Even if the learned arbitrator was wrong in not giving the parties the opportunity to submit on the 10-15% no-risk profit norm for P&A, we do not consider the breach to be of such gravity and materiality that the respondent can be said to have been denied due process under s. 20 of the Act. It would not in our view have affected the outcome of the learned arbitrator's decision on the loss of profit award.
>
> [110] It is clear to us that the arbitrator's loss of profit ruling was based on evidence before him and the inferences to be drawn therefrom. Both courts below were therefore wrong in setting aside the loss of profit award, either under s. 37 or under s. 42 of the Act or under both s. 37 and s. 42.

[57] To conclude on this issue, we find that the learned judge fell into error when he failed to consider both the award and the supplementary award in totality. The learned judge had failed to give a proper analysis of the reasons given by the arbitrator on her dismissal of Sime Darby's counterclaim for the rectification costs of RM246,978. Therefore, the learned judge was wrong to conclude in para. [35] that the arbitrator was limiting Sime Darby's counterclaim in the arbitration to the retention sum only.

[58] Added to that, scant regard was given as to why the arbitrator had granted the retention sum in favour of Sime Darby, yet Sime Darby had moulded this favour in order to set aside not just the disputed rectification cost, but also the undisputed sum that was not paid to Garden Bay for work done under the contract.

[59] Based on the reasons enumerated above, we find that there was no breach of the rules of natural justice before the arbitral tribunal that warrants the whole award to be set aside.

Dispute Not Contemplated By Or Not Falling Within The Terms Of The Submission To Arbitration

[60] The other issue raised by the learned judge was whether the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration when the arbitrator decided that by conduct, the parties have accepted that Sime Darby's claim for rectification works is the sum retained as retention sum under the contract.

[61] On the legal position, we agree that it is trite law that when parties refer their dispute to arbitration, the mandate of the arbitrator must be limited to the terms defined by the parties for him to exercise his jurisdiction. If the arbitrator strays from the confines of this mandate, he will be acting in excess of his jurisdiction, even though he may have the initial and primary jurisdiction to arbitrate between the parties.

[62] On this issue, Sime Darby had submitted that the award and the supplementary award had dealt with a dispute not contemplated by or not falling within the terms of submission to arbitration when the arbitrator decided that by conduct, the parties have accepted that Sime Darby's claim for rectification costs is the sum retained as the retention sum under the contract.

[63] Sime Darby further submitted that the "dispute that was submitted by the appellant and respondent to the arbitrator was simply whether the appellant was entitled to RM338,666.39 being the balance sum which remain unpaid by the respondent in Denai Alam Project". (See para. 50 of respondent's written submission).

[64] Therefore, Sime Darby submitted that the learned judge had accurately made the following findings:

> [48] Here, while it was within the parties' submission to arbitration that the arbitrator should decide on whether the respondent was entitled to the sum of RM246,978 being the costs of rectification works or such other amount as may be assessed by the arbitrator or not at all, it certainly was not within the submission and contemplation of the parties that the arbitrator would be deciding on whether there was consent between the parties by conduct that the respondent had accepted the retention sum as the amount they are entitled to in the event that rectification works have to be done. What is even more perplexing is that in the very next breath the arbitrator had held that this is so "although not provided for in the contract for this matter".
>
> [49] The arbitrator had earlier set out cl. 5(b) which is the provision in the contract for this matter.
>
> [50] Here, we are not quibbling or questioning the finding of fact of the arbitrator but we are dealing with a far more basic issue which is whether the parties had agreed in their submission to arbitration that the arbitrator should be deciding on this very matter of whether there was such a conduct of the parties on the acceptance of the retention sum as all that the respondent could claim in the event of rectification works that are needed to be done.
>
> [51] The answer is a resounding 'no'!, being not a matter pleaded or at play in the arbitral proceedings or in the submission filed by both parties.

> [52] That being the case, the award has ventured into a dispute not contemplated by or not falling within the terms of the submission to arbitration and as such the consequence is that the whole of the award has to be set aside.

[65] In the first place, it is not correct for Sime Darby to submit that the issue submitted for arbitration was Garden Bay's claim for RM338,666.39 only, being the balance sum which remain unpaid by Sime Darby in project. The issue on the rectification cost was also part of Sime Darby's counterclaim in the arbitration, and this was accepted by the learned trial judge in para. [48] of the judgment, that it was "within the parties' submission to arbitration that the arbitrator should decide on whether the respondent was entitled to the sum of RM246,978 being the costs of rectification works or such other amount as may be assessed by the arbitrator or not at all ...".

[66] Therefore, the issue posed by Sime Darby and accepted by the learned judge, that whether there was consent between the parties by conduct that Sime Darby had accepted the retention sum as payment for the rectification, was an issue within the contemplation of the parties on the rectification costs. As accepted by the learned judge, the arbitrator should decide on whether Sime Darby was entitled to the sum of RM246,978 being the costs of rectification works or such other amount as may be assessed by the arbitrator or not at all.

[67] In the present case the arbitrator, after making a finding that Sime Darby had failed to prove that it was entitled to the sum of RM246,978 being the costs of rectification works, proceeded further and made a finding in favour of Sime Darby, that Sime Darby can keep the retention sum. The arbitrator has made a finding of fact that because both Garden Bay's progress claims and the SO's interim payment certificates (Sime Darby) had included a percentage of the contract sum for retention sum, (although not provided for in the contract), the arbitrator then came to a conclusion that the said conduct showed the intention of the parties to accept this retention sum as a mode to allocate funds for rectification works.

[68] In fact, the arbitrator had noted Sime Darby's arguments that the retention sum was for LAD permitted pursuant to cl. 40 of the contract, whilst the arbitrator decided that the retention sum can be a mode to allocate funds for rectification works. Therefore, it was wrong for the trial judge to make a finding that award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration. The arbitrator was tasked to decide whether Sime Darby was entitled to the full sum of the rectification cost, any sum to be assessed by the arbitrator or no amount at all of the rectification cost.

[69] The Federal Court in the case of *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1; [2019] 2 MLJ 413 explained that the scope of public policy ground for setting aside an arbitral award can be invoked:

> [58] The scope of public policy ground for setting aside an arbitral award could only be invoked in deserving case ie, in instances where it appears a violation of the most basic notions of morality and justice. It covers fundamental principles of law and justice in substantive as well as procedural respect. *Instances where the upholding of an arbitral award would shock the conscience, or clearly injurious to the public good, or wholly offensive to the ordinary reasonable and fully informed member of the public, had been held by courts in various jurisdiction to fall within the category of public policy ground for setting aside an arbitral award. Thus, instances such as "patent injustice", "manifestly unlawful and unconscionable", "substantial injustice", "serious irregularity" and other similar serious flaws in the arbitral process and award, would also fall within the applicable concept of public policy and therefore by virtue of s. 37(1)(b)(ii) of the AA 2005* when proven, can be a ground for the court to exercise its discretion to set aside the award. (see: *Ajwa for Food Industries* (*supra*)). Such instances fall within "the basic and fundamental notions or principles of justice". The court must adopt the principle as laid down by Howard M. Holtzmann and Joseph E Neuhans as found in their commentary in "*A guide to the UNCITRAL Model on International Commercial Arbitration: Legislative History and Commentary*" (*supra*) "that the term "public policy" which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects." The terms "patent injustice" or "substantial injustice" or "manifestly unlawful and unconscionable" as often used by the court in setting aside arbitral awards, do not mean injustice which is more than *de minimis*; what is required is that the injustice had real effect and had prejudiced the basic right of the applicant. (see: *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86). (emphasis added)

[70] Premised on the reasons enumerated above, we find that it cannot be said that the arbitral award would shock the conscience, or clearly injurious to the public good, or wholly offensive to the ordinary reasonable and fully informed member of the public that renders the award to be set aside on public policy.

Conclusion

[71] For the reasons enumerated above, we are of the considered opinion that the appeal must be allowed with costs. The order of the High Court is set aside and the application for the enforcement of the award is allowed.